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No. 84-345

In the Supreme Court of the United States

OCTOBER TERM, 1984

SARAH BARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court erred by replacing a juror with an alternate shortly after the jury's deliberations had commenced.

1. Petitioner was convicted by the United States District Court for the Middle District of Alabama on one count of misapplying and converting to her own use nine traveler's checks, in violation of 18 U.S.C. 656. She was sentenced to three years' probation, conditioned upon her making restitution in the amount of $900. The court of appeals affirmed (Pet. App. 10-17; 735 F.2d 1280).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was employed as a loan officer by the Southern Bank in Montgomery, Alabama. As such, she had access to areas where the bank's traveler's checks were stored. In late June 1982, a routine audit discovered that nine of the checks were missing. Between July 2

and July 5, the checks were negotiated under the name "Sharon Barnes" in stores and restaurants in four towns north of Montgomery. Two of petitioner's co-workers testified that the signatures on the checks resembled petitioner's, and a documents examiner from the Federal Bureau of Investigation concluded that the checks were in fact signed by petitioner. Pet. App. 12-13.

Approximately 20 minutes after the jury began its deliberations, a deputy marshal advised the court that on the way to the jury room, a female juror had walked over to petitioner, placed her hand on petitioner's shoulder, and smiled. The court immediately ordered the jury to cease its deliberations and return to the courtroom. The government moved to dismiss the juror on the ground that she was not impartial. Petitioner objected, and also refused to continue with 11 jurors. The court granted the motion, and substituted an alternate juror who was still in the courthouse. The court then instructed the jury at length concerning the need to avoid any appearance of partiality. In response to the court's inquiry, the jurors indicated that they would be able to disregard their previous deliberations and deliberate impartially with the new juror. The court instructed the jury to begin its consideration of the case anew. Two hours and five minutes later, the jury returned its verdict of guilty. Pet. App. 13-14.

The court of appeals concluded that the district court had "meticulously met the demands" of *United States* v. *Phillips*, 664 F.2d 971, 990-997 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), by obviating any danger of prejudice to petitioner (Pet. App. 15). The court of appeals noted that the district court explained the dismissal to the jury "in a non-prejudicial manner * * * [that] did not implicate the [petitioner] in any misconduct," that none of the jurors indicated any reservations about his or her ability to begin

anew, and that the alternate juror "participated fully in the more than two hours of deliberations which followed" (*ibid.*).

2. Petitioner contends (Pet. 3-6) that the district court committed reversible error by its substitution of an alternate juror in technical violation of Rule 24(c) of the Federal Rules of Criminal Procedure, which provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." [1] This contention was properly rejected by the court of appeals in a decision that does not conflict with any decision of this Court or any other court of appeals. Moreover, the Rules have been amended since the trial of this case to permit a jury of 11 persons to return a verdict, even absent a stipulation of the parties, where the court finds it necessary to excuse a juror after deliberations have begun. Accordingly, the substitution of an alternate juror in this situation is unlikely to recur.

a. In *United States* v. *Phillips, supra*, the court of appeals concluded, after a thorough examination of the history and purpose of Rule 24(c), that a violation of the Rule does not require reversal in the absence of prejudice to the defendant (664 F.2d at 992-995). Application of this principle to the instant case was eminently reasonable. The greatest risk of prejudice that may arise when an alternate juror is substituted after deliberations have begun is that he may be subject to coercion by those who have already

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[1]Petitioner also asserts (Pet. 4, 7), without citation of authority, that the procedure employed by the district court violated her Fifth and Sixth Amendment rights. This claim is without merit. See *United States* v. *Phillips*, 664 F.2d at 992-993; *Henderson* v. *Lane*, 613 F.2d 175, 176-179 (7th Cir.), cert. denied, 446 U.S. 986 (1980); *People* v. *Skelton*, 109 Cal. App. 3d 691, 167 Cal. Rptr. 636 (1980), cert. denied, 450 U.S. 917 (1981). The court of appeals noted (Pet. App. 16) that "[a]lthough no specific finding was made regarding prejudice, it is quite obvious the trial court determined that [petitioner] would not be prejudiced by the substitution."

formed a firm opinion of the case.[2] The short length of time during which the jury deliberated before the alternate was substituted as compared with the much longer period of deliberations with the alternate, however, combined with the court's careful instructions and inquiry of the jurors, ensured that petitioner suffered no prejudice. Given petitioner's objection to proceeding with only 11 jurors, the court's substitution of the alternate, who was still in the courthouse, was quite obviously the most practical course to take. It would be anomalous to conclude that the Rules, which "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances" (*Fallen* v. *United States*, 378 U.S. 139, 142 (1964)), require reversal on these facts. See also Fed. R. Crim. P. 2, 52.

The cases cited by petitioner as being in conflict are distinguishable from or actually support the decision below. In *Martin* v. *United States*, 691 F.2d 1235, 1238 (8th Cir. 1982), cert. denied, 459 U.S. 1211 (1983), the court cited *Phillips* favorably and found no prejudice to the defendant from the substitution of an alternate under the facts before it. Similarly, in *United States* v. *Hayutin*, 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1968), where three alternates were not discharged as required by Rule 24(c), the court affirmed because it could not "find that [the] defendant * * * was prejudiced by the presence of the alternates" (398 F.2d at 950). In *United States* v. *Beasley*, 464 F.2d 468 (10th Cir. 1972), the court reversed where the alternate had remained in the jury room after the jury retired to deliberate. The court reasoned that the alternate was present as a

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[2]Another risk — that the alternate juror may have discussed the case with others after being excused — was not present here (Pet. App. 16). Only 20 minutes had elapsed, and the alternate had not left the courthouse before being recalled.

"stranger[ ]" who "destroy[ed] the sanctity of the jury" (*id.* at 470). Here, by contrast, the privacy and secrecy of the jury were not violated by the presence of such a stranger. Finally, in *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc), the jury had reached a guilty verdict after deliberating for four hours over the course of two days. The district judge rejected the verdict, and replaced a juror who asked to be excused with an alternate who had gone home and who knew that the jury had already reached a verdict. Twenty-nine minutes after it began further deliberations, the jury again found the defendant guilty. It was quite clear under those circumstances that the defendant was prejudiced because the newly constituted jury had not considered the case fully and without reliance on the previous deliberations.[3] The instant case presents a much different situation, where the jury had deliberated only briefly before the substitution and had not yet reached a verdict, and where it deliberated much longer after the alternate was substituted. This Court has refused to resolve the asserted conflict with *Lamb* on prior occasions, and there is no reason for a different action here.

b. In any event, Rule 23(b) of the Federal Rules of Criminal Procedure has been amended, effective August 1, 1983, to provide that "[e]ven absent [a] stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." This change eliminates the need to substitute an alternate juror where, as here, a juror has been excused after deliberations have begun. Accordingly, the circumstances presented are unlikely to recur with any frequency.

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[3]Given these facts, the court's suggestion (529 F.2d at 1156 n.7) that any violation of Rule 24(c) requires reversal must be regarded as dictum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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